# MOTIONS TO SUPPRESS

Prosecutor's Deskbook Supplement

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# Motions To Suppress

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# Motions To Suppress

Basic Premise:

In general, a motion to suppress is, at its core, a particularized request by a defendant to preclude the State from using against him some type of evidence that was gathered.

Authority:

Due process concerns generally form the basis for a motion to suppress. Our Practice Book lays out the basic foundation:

P.B. 41-12 - "Upon motion, the judicial authority shall suppress potential testimony or other evidence if it finds suppression is required under the constitution or laws of the United States or the State of Connecticut."

Types of Motions to Suppress:

The most common motions to suppress are:

1. **Motion to Suppress Evidence**

2. **Motion to Suppress Statement of Defendant**

3. **Motion to Suppress Eyewitness Identification**

# I. Motion to Suppress Evidence

Evidence gathered by the police in any given case may be seized with or without the authority of a search warrant. Thus, the most common motions to suppress evidence come in the context of a defendant's claim that:

A. evidence was seized without a warrant and not under a recognized exception to the warrant requirement, or

B. the search warrant that was obtained was somehow defective.

## A. Motions to suppress based on warrantless seizure of evidence in violation of the 4th Amendment.

If evidence is seized without a warrant, a defendant may file a motion to suppress claiming that the evidence was seized in violation of his right to be protected from unreasonable searches and seizures.

### 1. Basic Premise:

Under the 4th Amendment to the U.S. Constitution, and Article 1, Section 7 of the Connecticut Constitution, any search conducted without a warrant issued upon probable cause is per se unreasonable. Thus, courts view warrantless searches as unconstitutional unless they are justified under a recognized exception to the warrant requirement. Therefore, any evidence seized without a warrant is subject to an attack by way of a motion to suppress.

### 2. Prosecutor's role at a motion to suppress evidence:

To successfully oppose a motion to suppress evidence that was seized without a warrant, the State has the burden to establish the existence of one of the exceptions to the warrant requirement. (The more common exceptions are listed below.) To illustrate, assume a defendant is stopped on the sidewalk, searched, and found to be in possession of narcotics. This defendant may file a motion to suppress the evidence claiming that he was illegally seized and searched. At the suppression hearing, the State would be required to put on evidence (the testimony of the arresting officer(s) in this situation) to show that at the time the defendant was seized, the officer(s) had a reasonable, articulable suspicion to seize him (i.e. Terry exception), and that the subsequent search was based on another exception to the warrant requirement (i.e. consent, plain feel, etc.).

3. Exceptions to the warrant requirement:

Note: - The exceptions and a brief explanation of each are listed below. For a more thorough review of these exceptions, see the Prosecutor's Deskbook section on "Arrest, Search & Seizure".

a. Plain View Searches

- Police may seize without a warrant any item reasonably believed to be contraband or evidence of a crime that is in plain view if:

(1) they are lawfully entitled to be in a position to view the item, and
(2) it is immediately apparent that the item is contraband or evidence of a crime. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

b. Plain Feel Searches

- An item detected lawfully through the sense of touch may be seized without a warrant if it is immediately apparent, without removal, visual inspection, or further manipulation, that the item is contraband. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Trine*, 236 Conn. 216 (1996).

In *Dickerson*, the plain feel exception did not apply because the nature of the item was not immediately apparent and the officer had to continually feel and manipulate it in order to conclude that it was contraband.

In *Trine*, the plain feel exception did apply because the officer was able to immediately determine, based on his experience and knowledge of illegal drugs, that the item was contraband.

Remember: - Plain feel, as with plain view, cannot arise as a result of a 4th Amendment violation. The officer must have a prior justification for seizing the defendant and for putting his hands on the defendant in the first place.

c. Consent

- A warrantless entry or search is permitted on the basis of the free and voluntary consent of an authorized person. *State v. Reagan*, 209 Conn. 1 (1998). Be mindful that there are sub-issues which may apply to the question of consent, such as *shared premises*, *apparent authority*, *right to refuse*, etc.

d. Exigent Circumstances

- Exigent circumstances exist, in general terms, when there is a compelling need for official action and there is no time to secure a warrant. Typically, exigent circumstances exist if, absent immediate official action, "the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others." *State v. Guertin*, 190 Conn. 440 (1983).

e. Search Incident to Arrest

- A lawful, custodial arrest permits the police to conduct a full search (not just a frisk for weapons) of the arrestee's person and the area within his immediate control ("Chimel Zone"). *State v. Hull*, 210 Conn. 481 (1989). Remember, this search may occur on-scene at the time of the arrest, or be conducted after the arrest at the detention destination.

Note: - When the arrestee is an occupant of a car, and the arrestee is detained at the scene, the officer may contemporaneously search the interior compartment of the car only when:

1. the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or

2. when it is reasonable to believe that evidence *relevant to the crime for which the defendant was arrested* might be found inside the vehicle. Arizona v. Gant, 556 U.S. ___ (2009).

f. Terry Stops

- The 4th Amendment permits brief investigative stops when a police officer has a "*particularized and objective basis for suspecting the particular person stopped of criminal activity*", *Terry v. Ohio*, 392 U.S. 1 (1968) and may perform a pat-down if they have a reasonable belief that the person is potentially armed or dangerous. A Terry stop is permissible if:

1. the officer has a reasonable suspicion that a crime has occurred, is occurring, or is about to occur;
2. the purpose of the stop is reasonable; and
3. the scope and character of the detention is reasonable when considered in light of its purpose. *State v. Cyrus*, 297 Conn. 829 (2010).

g. Automobile Exception

- Police may conduct a warrantless on-the-scene search of a motor vehicle based on probable cause to believe that it contains contraband or evidence of a crime. *State v. Longo*, 243 Conn. 732 (1998).

Remember: - The scope of the search is defined by the nature of the probable cause and includes any and all places and containers in the vehicle that are capable of containing the contraband or evidence. *State v. Williams*, 311 Conn. 626 (2014).

h. Inventory Search

- Police are permitted to inventory vehicles and other items lawfully in their custody so long as the inventory is conducted pursuant to a standardized departmental procedure. This inventory search derives its authority from the physical possession by the police, not probable cause or other legal authority. The purpose of the search is twofold: to ensure that the items are safe and to protect the police from claims of loss. *State v. Billias*, 17 Conn.App. 635 (1989).

i. Protective Sweep

- Police are permitted to conduct a limited protective sweep (looking for suspects) of an area adjoining an arrest to ensure their own safety and the safety of others. *Maryland v. Buie*, 495 U.S. 325 (1990).

j. Community Caretaking

- Action taken by the police that is "totally divorced from the detection, investigation, and or acquisition of evidence relating to the violation of a criminal statute," does not constitute a search for constitutional purposes. *State v. Bernier*, 246 Conn. 63 (1998).

Example: - It was permissible for a police officer to enter an unlocked car with a broken vent window, that was left unattended in school parking lot at night for the purpose of securing a guitar visible in the backseat. Once inside the car, the officer observed drug paraphernalia in plain view.

k. Emergencies

- Police may enter a private residence without a warrant if they possess an objectively reasonable belief that an occupant may be in immediate danger or in need of aid. *State v. Blades*, 225 Conn. 609 (1993).

l. Abandoned Property

- No reasonable expectation of privacy exists in property which has been fully abandoned. Consequently, such property may be seized and searched without a warrant. *State v. Sirvi*, 231 Conn. 115 (1994).

Remember: - Property which is left unattended in a public place more or less out of necessity is NOT deemed fully abandoned. See *State v. Joyce*, 229 Conn. 10 (1994). Such items may be seized without a warrant for safe keeping, inventoried pursuant to the community caretaking function, but may NOT be further searched (i.e. chemical testing) without obtaining a warrant to do so. (known as a Joyce warrant)

m. Dog Sniff

- A drug dog sniff of a *protected area* (i.e. curtilage) IS a search and, therefore, requires a warrant or the existence of an exception to the warrant requirement. *Florida v. Jardines*, 569 U.S. ____ (2013).

- A drug dog sniff of the exterior of a validly stopped car is NOT a search so long as the procedure does not prolong the time of the stop beyond the purpose that justified the stop. *Rodriguez v. U.S.*, 575 U.S. ____ (2015).

- Connecticut has upheld dog sniffs (of mail parcel and exterior of car) based on reasonable articulable suspicion, but has yet to rule on a dog sniff done without any suspicion. *State v. Waz*, 240 Conn. 365 (1997); *State v. Torres*, 230 Conn. 372 (1994).

n. Garbage Pulls

- Trash placed outside for pick-up is considered abandoned and may be seized and searched without a warrant. *State v. DeFusco*, 224 Conn. 627 (1993).

4. Exclusionary Rule:

Evidence seized as a result of unlawful police action, or any evidence that is "fruit of the poisonous tree", is subject to suppression at trial. *Wong Sung v. United States*, 371 U.S. 471 (1963). The sole purpose of the exclusionary rule is to deter future violations of the 4th Amendment.

5. State's Burden:

When evidence is seized without a warrant, the burden is on the State to show, by a preponderance of the evidence, that the search was justified under an exception to the warrant requirement. *State v. Badgett*, 200 Conn. 412 (1986).

The rationale for placing the burden on the State is understandable because the State did not seek prior judicial authorization (obtain a warrant) to seize the evidence.

6. Standing:

The first issue that the State should address when confronted with a motion to suppress evidence is whether the defendant even has standing to object to its seizure. Without standing, the defendant may not object to the admission of the evidence.

A defendant has standing to object if:

(1) he has an actual, subjective expectation of privacy in the place that was searched; and

(2) the defendant's expectation is one that society would recognize as reasonable. *State v. Pittman*, 209 Conn. 596 (1989).

Only persons who possess a reasonable expectation of privacy in a particular area or item have standing to challenge the propriety of a search. *State v. Joyce*, 229 Conn. 10 (1994).

For example, a passenger in a motor vehicle who has no ownership interest in that car has no reasonable expectation of privacy in a search of that car. *State v. Kinch*, 168 Conn.App. 62 (2016). Therefore, the defendant has no standing to file a motion to suppress. Id., *State v. Burns*, 23 Conn App 602 (1990).

Note: - The defendant has the burden to establish standing. *Pittman*, at 601.

7. Procedure:

If a defendant files a motion to suppress evidence based on the warrantless seizure of evidence, it is the State's obligation to establish, through an evidentiary hearing, that the warrantless search and seizure of the defendant was constitutional.

At the hearing, the State must show by a preponderance of the evidence the existence of an exception to the warrant requirement. This is usually done through eliciting testimony from the officers involved in the encounter.

Remember: - If standing is in issue, the defendant must establish that first.

8. Finding:

If the court finds that the State has met its burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation).

If the court finds that the State has NOT met its burden, then the evidence will be suppressed, and thus will not be admissible at trial.

9. Miscellaneous aspects of the motion to suppress: (*State v. Edmonds* Dilemma)

In *State v. Edmonds*, 323 Conn. 34 (2016), the Connecticut Supreme Court profoundly changed the landscape of motions to suppress. The essential thrust of the decision is that the appellate court may engage in a probing factual review of the entire record, looking for "any undisputed evidence that does not support the trial court's ruling in favor of the State but that the trial court did not expressly discredit."

a. What does this mean:

- The effect of *Edmonds* is that motions to suppress may essentially be re-tried on appeal by appellate attorneys and jurists with little regard for what happened below. The appellate court is allowed to look at the entire record, *not just the express findings of the trial court*, and if there is evidence which was not expressly contested, it is fair game on appeal for the reviewing court to use against the prevailing party and the trial court. In the past, reviewing courts typically just assumed that the trial court had implicitly rejected or discounted such evidence.

b. What are the consequences:

- The import of this decision is that a prosecutor facing a motion to suppress must carefully consider what to put into evidence and avoid that which is unnecessary or extraneous. This is understandably a very difficult task because it requires the prosecutor to walk a fine line between offering enough evidence to satisfy the burden of proof, and not so much evidence that, even if "undisputed" at the hearing, may be later used against the State by the reviewing court.

Note: - In the context *Edmonds*, "undisputed" seems to mean that the evidence exists somewhere in the record and was not expressly discredited by the trial court. It does not mean contemplated and agreed to by the parties, and it does not matter what, if any, role it played at the hearing.

c. What to do about it:

First: As stated, prosecutors conducting motions to suppress must carefully consider what to introduce into evidence. Attempt to limit the evidence you present to that which is necessary for, and consistent with, the State's factual theory of the case. Be careful of presenting, or agreeing to the admission of, documentary evidence without examining it in its entirety. If a document comes in without limitation, its entire content is fair game on appeal.

Second: The factual and legal arguments you make in support of your position must be carefully crafted with an understanding that the theory of the case you present to the court *might not limit what may later be claimed on appeal.* Also, to the extent possible, seek to expressly challenge and dispute evidence of record that is inconsistent with the State's factual theory, *regardless* of whether the defense considers it important or not.

Third: Judges issuing rulings on the motions to suppress must be educated that their decisions must contain unmistakably clear, concise and express credibility determinations and findings of material fact, taking care not to ignore, overlook, or leave unaccounted for, any "undisputed" evidence of record that is arguably adverse to the ruling. Urge the court to articulate in its decision the fact that they have carefully considered the entire record and, whether expressly noted or not, they have rejected or chosen not to credit all of the evidence in the record that is either contrary to, or does not support, their decision.

Note: - Even though *Edmonds* was decided in the context of a 4th Amendment motion to suppress evidence, unfortunately, it is reasonable to assume that its holding will eventually apply in the review of a motion to suppress a statement or an identification. Therefore, precautions should be taken in any suppression hearing.

## B. Motions to suppress evidence seized under a search warrant

If evidence is seized under the authority of a search warrant, the defendant may file a motion to suppress claiming that the search warrant should not have been approved by the judicial authority.

Motions to suppress evidence seized under a search warrant generally fall into two categories:

(1) the defendant claims the search warrant is somehow defective, or

(2) the defendant raises a Franks v. Delaware violation.

### 1. Two types of motions to suppress when the State obtains a search warrant

a. Suppression based on a "defective" search warrant.

i. Standard for approving a search warrant

The standard for upholding a search warrant is well established. A search warrant is valid if "the affidavit at issue presented a substantial factual basis for the magistrate's conclusion that probable cause existed." *State v. Duntz*, 223 Conn. 207, 215 (1992).

ii. Standard for contesting the search warrant

A hearing on a motion to suppress evidence seized under a search warrant is limited to a review of the four corners of the affidavit. *State v. Diaz*, 226 Conn. 514 (1993).

"When a magistrate has determined that the warrant affidavit presents sufficient objective indicia of reliability to justify a search and has issued a warrant, a court reviewing that warrant at a subsequent suppression hearing should defer to the reasonable inferences drawn by the magistrate. [T]he magistrate is entitled to draw reasonable inferences from the facts presented." *State v. Barton*, 219 Conn. 529 (1991).

"[I]n a doubtful or marginal case...our constitutional preference for a judicial determination of probable cause leads us to afford deference to the magistrate's determination." *State v. Johnson*, 219 Conn. 557 (1991).

iii. Basis for the motion to suppress

Suppression based on a defect in the warrant is a 'catch-all' basis and encompasses a variety of possible attacks on a search warrant. These attacks can include:

* No. P.C.: The facts in the affidavit simply do not amount to probable cause.

* Staleness: The facts in the affidavit had become stale.

* Particularity: The place to be searched or the item(s) to be seized were not described with sufficient particularity.

* Bad Informant: The affidavit does not adequately articulate *the "basis of knowledge" and/or the "reliability"* of the informant or of the information (if the information was not derived from the affiant's own personal knowledge i.e. confidential informants).

* Nexus to Place: The affidavit lacks a sufficient nexus between the item(s) to be seized and the place to be searched.

* Nexus to Crime The affidavit lacks a sufficient nexus between the item(s) to be seized and the crime under investigation.

iv. Prosecutor's role at a motion to suppress claiming a defect in the warrant

If a defendant files a motion to suppress for a defect in the warrant, he has the burden to prove the existence of the defect. Therefore, the prosecutor, in somewhat of a role reversal, is in the position of "defending" the attack; arguing that there was no defect in the warrant or, if there was a defect, it did not rise to the level such that the warrant should be invalidated.

Note: - Even though the State is defending against the motion, because the witnesses are likely to be police officers, the prosecutor will often assume responsibility for presenting the witnesses.

b. A '*Franks v. Delaware'* violation

If a defendant attacks a search warrant by claiming that the allegations in the search warrant affidavit are false, or that significant material information was intentionally or recklessly omitted from the affidavit, the motion to suppress is commonly referred to as a "Franks" motion.

To prevail on a Franks motion, the defendant has a two-fold burden:

First, before the defendant is even entitled to a hearing, he must make a *substantial preliminary showing* that:

1 - a misstatement of fact was included in the affidavit - either knowingly and intentionally or with reckless disregard for the truth, or that material was omitted; AND

2 - the allegedly false statement or omission was necessary for the finding of probable cause. *State v. Glenn*, 47 Conn.App. 706 (1998); *State v. Batts*, 281 Conn. 682 (2007).

Second, at the subsequent hearing, the defendant must establish, by a preponderance of the evidence, that:

1 - the statement or omission was in error; AND

2 - *with the offending portion of the affidavit deleted,* the remaining portions of the affidavit are insufficient to show probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978).

Note: - When arguing a *Franks* motion, at the preliminary stage "the [defendant's] attack must be more that cursory… there must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of the witnesses should be furnished, or their absence satisfactorily explained." Id. at 171.

i. Prosecutor's role at a motion to suppress for a "Franks" violation

If a defendant files a motion to suppress for a "Franks" violation, he has the burden to prove the existence of the misstatement or falsehood. Therefore, the prosecutor, in somewhat of a role reversal, is in the position of "defending" the attack; arguing that there was no misstatement or falsehood or, if there was, it should not invalidate the warrant.

2. Defendant's Burden:

Whether the defendant is attacking a defect in the warrant or a falsehood in the affidavit, the burden is on the defendant to show by a preponderance of the evidence that there is not probable cause in the search warrant. See, generally, S*tate v. Joyce*, 229 Conn. 10 (1994).

The rationale for placing the burden on the defendant is understandable because even though the State has the ultimate burden to prove its case beyond a reasonable doubt, in securing the warrant, the State has already sought and obtained prior judicial authorization to seize the evidence, and should not be compelled to do so a second time in the face of a motion to suppress.

3. Standing:

The first issue that the State should address when confronted with a motion to suppress evidence is whether the defendant even has standing to object to its seizure. Without standing, the defendant may not object to the admission of the evidence. (See above Section A.6. on standing.)

4. Procedure:

If a defendant files a motion to suppress evidence which was seized under the authority of a search warrant, it is the defendant's obligation to show, at an evidentiary hearing, that there is a defect in the warrant or a falsehood in the affidavit. At the hearing the defendant must prove, by a preponderance of the evidence, that such a defect or falsehood existed.

5. Finding:

If the court finds that the defendant has NOT met his burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation). If the court finds that the defendant HAS met his burden based on a defect in the search warrant, then the evidence will be suppressed, and thus will not be admissible at trial.

Remember: - If the defendant HAS met his burden based on a "*Franks"* violation, *then the offending portions of the affidavit are deleted,* and the remaining portions are analyzed to see if the affidavit is still sufficient to show probable cause. If probable cause remains, the evidence gathered is admissible. If, with the offending portions removed, there is no longer probable cause, the evidence will be suppressed.

6. Miscellaneous aspects of the motion to suppress: (*State v. Edmonds* Dilemma)

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1. What does this mean:

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2. What are the consequences:

- The import of this decision is that a prosecutor facing a motion to suppress must carefully consider what to put into evidence and avoid that which is unnecessary or extraneous. This is understandably a very difficult task because it requires the prosecutor to walk a fine line between offering enough evidence to satisfy the burden of proof, and not so much evidence that, even if "undisputed" at the hearing, may be later used against the State by the reviewing court.

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3. What to do about it:

First: As stated, prosecutors conducting motions to suppress must carefully consider what to introduce into evidence. Attempt to limit the evidence you present to that which is necessary for, and consistent with, the State's factual theory of the case. Be careful of presenting, or agreeing to the admission of, documentary evidence without examining it in its entirety. If a document comes in without limitation, its entire content is fair game on appeal.

Second: The factual and legal arguments you make in support of your position must be carefully crafted with an understanding that the theory of the case you present to the court *might not limit what may later be claimed on appeal.* Also, to the extent possible, seek to expressly challenge and dispute evidence of record that is inconsistent with the State's factual theory, *regardless* of whether the defense considers it important or not.

Third: Judges issuing rulings on the motions to suppress must be educated that their decisions must contain unmistakably clear, concise and express credibility determinations and findings of material fact, taking care not to ignore, overlook, or leave unaccounted for, any "undisputed" evidence of record that is arguably adverse to the ruling. Urge the court to articulate in its decision the fact that they have carefully considered the entire record and, whether expressly noted or not, they have rejected or chosen not to credit all of the evidence in the record that is either contrary to, or does not support, their decision.

Note: - Even though *Edmonds* was decided in the context of a 4th Amendment motion to suppress evidence, unfortunately, it is reasonable to assume that its holding will eventually apply in the review of a motion to suppress a statement or an identification. Therefore, precautions should be taken in any suppression hearing.

# II. Motion to Suppress Statement of Defendant

In general, a defendant will move to suppress his own statement when he believes the statement was taken in violation of his 5th Amendment right to remain silent.

A. Basic Premise:

A defendant's statement violates the 5th Amendment:

(1) when the statement is taken during a custodial interrogation that is not preceded by the proper warnings, or

(2) when, even if warnings are given, the statement is found to have been involuntarily given.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court mandated four warnings that must be given before a defendant may be interrogated while in custody. The defendant must be advised that:

(1) he has the right to remain silent;
(2) anything he says can be used against him in court;
(3) he has the right to have an attorney present during the questioning; and
(4) if he cannot afford an attorney, one will be provided for him prior to any questioning.

These "*Miranda*" warnings are required under the 5th Amendment to the U.S. Constitution, and Article 1, Section 8 of the Connecticut Constitution.

B. Three components necessary for suppression

There are three essential components which all must be established for a defendant to prevail on a motion to suppress his statement. Therefore, a defendant's statement will NOT be suppressed IF:

(1) the defendant FAILS to prove he was in **custody**; or
(2) the defendant FAILS to prove he was **interrogated**; or
(3) the State proves the defendant **did not invoke** his rights, or proves the defendant **voluntarily waived** his rights.

C. State must establish a valid waiver even in the absence of a motion to suppress

When the State intends to offer a custodially interrogated statement of the defendant, it is incumbent upon the State to affirmatively prove that the defendant waived his 5th Amendment rights, even if a motion to suppress has not been filed. This is because the 5th Amendment right to remain silent is a fundamental right and, therefore, a presumption exists that the defendant did not waive that right. *State v. Rollins,* 20 ConnApp. 27 (1989).

D. Procedure:

If the defendant files a motion to suppress his statement, he has the initial burden to put on evidence to prove that he was *in custody* AND that he was *interrogated.* Then, it is the State's burden to put on evidence to prove that *Miranda* warnings were given to the defendant and that the defendant voluntarily waived his rights. This voluntary waiver must be shown by a fair preponderance of the evidence. *State* v. *Rasmussen,* 225 Conn. 55 (1993).

Remember: - Even if a defendant does NOT file a motion to suppress, if the State intends to offer a statement of the defendant, the State must still establish the voluntariness of the statement.

E. Prosecutor's role at the motion to suppress statements:

If a defendant files a motion to suppress his statement, he has the burden to show that he was custodially interrogated. Therefore, the prosecutor, in somewhat of a role reversal, is in the position of "defending" the attack; eliciting facts and arguing that the defendant either (1) was not in custody, (2) was not interrogated, or (3) if he was custodially interrogated, the defendant nevertheless waived his rights. Each of the three components is discussed, in turn, below.

1. **Custody**:

a. Definition of custody

A defendant is “in custody” if he is under arrest OR is deprived of his liberty in a significant way. This has been held to mean that a “reasonable person in the defendant’s position would believe that he or she was in police custody of the degree associated with a formal arrest.” *State v. Atkinson*, 235 Conn. 748, at 758 (1993).

The court in *State v. Mangual*, 311 Conn. 182 (2014), thoroughly explored the issue of “custody” for purposes of Miranda:

> "In determining whether a person is in custody [for purposes of Miranda], the United States Supreme Court has adopted an `objective, reasonable person test', the initial step [of which] is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and [to] leave. [The second step is] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda.*"

Put more simply, the custody issue requires us to determine, first, whether a reasonable person in the defendant's position would have believed that they were free to leave. If the answer to that question is yes, the inquiry is over because the defendant cannot establish custody for purposes of Miranda. If, however, the answer is no, we proceed to the second step of the inquiry, which asks whether that same reasonable person also would have believed that the police restraint on their freedom of action was akin to the restraint associated with a formal arrest. (See *State v. Mangual*, Supra).

b. Factors considered in determining whether defendant was in custody

Simply being stopped by the police or being in the police presence does not necessarily mean that a defendant is “in custody” for purposes of *Miranda*. In fact, even a police officer’s subjective intent to detain a person is only one factor, insofar as it is communicated to the person, in determining custody. *State v. Brown*, 199 Conn. 47 (1986).

When deciding the issue of custody, the court analyzes the totality of the circumstances to determine whether a reasonable person in the defendant’s circumstances would have felt free to leave the police presence. *State v. Fernandez*, 52 Conn.App. 599 (1999).

The following is a non-exclusive list of factors that a court could consider in determining whether a reasonable person in the defendant’s circumstances would not have felt free to leave: (see also *State v. Mangual*, 311 Conn 182 (2014).

* what was the nature, extent and duration of the questioning ?

* who initiated the initial encounter ?

* where did the questioning take place ?

    - on street, in defendant’s home, at police station, where in station

* who was present during the questioning ?

    - suspect’s family/friends present verses police dominated situation
    - how many officers present
    - police in uniform or plain clothes, were the officers armed

* what was defendant told during the questioning ?

    - “you can leave anytime” verses “you’re not going anywhere”

* was a voluntary interview form used ?

* what were the circumstances surrounding the questioning ?

    - was suspect given food, drink, allowed to use bathroom alone
    - was suspect ever placed in a jail cell
    - was suspect handcuffed or otherwise physically restrained

* was suspect allowed to leave after the questioning ?

c. Burden of proof

The defendant has the initial burden to prove that he was *custodially* interrogated for purposes of a motion to suppress under *Miranda*.

Then, it is the State's burden to prove that *Miranda* warnings were given to the defendant and that the defendant voluntarily waived his rights. This voluntary waiver must be shown by a fair preponderance of the evidence. *State* v. *Rasmussen,* 225 Conn. 55 (1993).

"In order to prove that the defendant has effectively waived his privilege against self-incrimination, the state must prove, by a preponderance of the evidence that the defendant knowingly and intelligently waived his constitutional right to remain silent. Waiver is not conclusively established by demonstrating that Miranda warnings were given and understood. In addressing this issue, we must presume that the defendant did not waive his constitutional rights." *State v. Rollins* 20 ConnApp. 27(1989) (internal citations omitted) (internal quotation marks omitted).

d. Miscellaneous aspects of the custody issue

1. Terry stops

A defendant subject to a valid Terry stop is NOT "in custody" for purposes of *Miranda*. *State v. Jackson*, 23 Conn.App 151 (1990).

2. Inmate interrogation

Questioning that takes place in prison is NOT, without more, automatically deemed to have taken place "in custody" for purposes of *Miranda.* *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010).

For Miranda purposes, custody does not exist unless a public official questions the defendant "in a context where [the defendant's] freedom to depart [is] restricted...." *Oregon v. Mathiason*, 429 U.S. 492, (1977). In the context of questioning conducted in a prison setting, restricted freedom "implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement." *Cervantes v. Walker*, 589 F.2d 424 (9th Cir.1978).

2. **Interrogation**:

a. Definition of interrogation

The term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police that the police knew, or should have known, were reasonably likely to elicit an incriminating response. *Rhode Island* v. *Innis,* 446 U.S. 291 (1980).

b. Test to apply to determine whether defendant was interrogated

The test is whether, under all the facts and circumstances, the questions asked are "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis.,* Id.

Whether a particular question is "likely to elicit an incriminating response" is an objective inquiry; the subjective intent of the police officer is relevant, but not conclusive, and the relationship of the questions asked to the crime committed is "highly relevant." *United States v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1981)*.

Note: - Be careful of inquires that the court deems to be the "functional equivalent" of interrogation. For example, a statement by the police to the defendant to the effect of “[this is your] opportunity to tell [your] side of the story" was deemed by the court to be interrogation.

c. Burden of proof

The defendant has the initial burden to prove that he was custodially *interrogated* for purposes of a motion to suppress under *Miranda*.

Then, it is the State’s burden to prove that *Miranda* warnings were given to the defendant and that the defendant voluntarily waived his rights. This voluntary waiver must be shown by a fair preponderance of the evidence. *State* v. *Rasmussen,* 225 Conn. 55 (1993).

d. Miscellaneous aspects of the interrogation issue

Ordinarily, routine gathering of background information, biographical data, and booking information will not constitute interrogation. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990)

"Voluntary statements of any kind are not barred by the 5th Amendment.” *Miranda* at 478, See also *State v. Vitale,* 197 Conn. 396 (1985).

3. **Waiver**:

If a suspect establishes he has been 'custodially interrogated' by the police, then in order for the State to be able to use that statement, the State must show that the suspect did not invoke, and voluntarily waived, his constitutional right to remain silent and consult with an attorney.

a. Waiver standard

A waiver is valid when the State can show that the suspect intentionally relinquished or abandoned a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Note: - Whether the suspect has validly waived his rights is judged by the standard of waiver that is applicable to other constitutional rights.

b. Factors considered in determining whether defendant waived his rights

The purpose of the Miranda warnings is to ensure that a confession is "the product of an essentially free and unconstrained choice by its maker." *State v. Derrico*, 181 Conn. 151 (1980).

Thus, for a confession to be voluntary, the test is whether all the factors establish that the conduct of the police did not overbear the defendant's will to resist, causing a confession that was not freely given. Id.

The following is a non-exclusive list of factors a court could consider in determining whether a suspect voluntarily waived his constitutional right to remain silent:

* the suspect's age
* prior experience with the police
* familiarity with the warnings
* level of intelligence, including I.Q. and education
* ability to read, write, and communicate in the language used
* level of intoxication or drug use
* the suspect's emotional state
* any mental disease, disorder, or retardation
* any medical condition or history
* length of suspect's detention
* the suspect's general physical condition

c. Burden of proof

Because the right to remain silent is a fundamental right, the defendant is entitled to a presumption that he did NOT waive his rights.

Therefore, the burden is on the State to show, by a fair preponderance of the evidence, that based on the totality of the circumstances, the defendant knowingly, voluntarily, and intelligently waived his 5th Amendment privilege. *State v. Madera*, 210 Conn 22 (1989).

d. Miscellaneous aspects of the waiver issue

i. A waiver need not be written to be valid.

See *State v. Lewis*, 220 Conn. 602 (1991)

ii. There is a presumption that the defendant did not waive his rights.

Because the right to remain silent is a fundamental right, the defendant does not even have to move to suppress his statements; the State MUST introduce evidence at his trial that he knowingly, voluntarily, and intelligently waived his 5th Amendment privilege. See *State v. Rollins*, 20 Conn.App. 27 (1989) (Defendant's conviction reversed because there was no evidence that defendant validly waived his *Miranda* rights despite no motion to suppress being filed).

iii. Invocation must be unambiguous.

The U.S. Supreme Court has held that a suspect's *Miranda* right to silence must be invoked unambiguously in order to be effective, and that mere silence, even protracted, is not sufficient to invoke the protection. This brings the *Miranda* right to silence in line with the *Miranda* right to counsel, which the court previously has held must be invoked unambiguously. *Berghius v. Thompkins*, 560 U.S.__(2010).

Note: - Relatedly, a suspect must unambiguously invoke his right to obtain counsel. The suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. U.S.,* 512 U.S. 452 (1994).

F. Situations where Miranda does not apply:

1. Public safety exception

The U.S. Supreme Court has recognized a "public safety" exception to the *Miranda* rule, holding that the "need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the 5th Amendment's privilege against self-incrimination." *New York v. Quarles*, 467 U.S. 649 (1984).

Note: - This exception applies to exigencies involving the safety of both the public at large and the officers on the scene.

2. Routine traffic stops

The U.S. Supreme Court has held that the "non-coercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for purpose of *Miranda*." *Berkermer v. McCarthy*, 468 U.S. 420 (1984).

Consequently, *Miranda* warnings are not required prior to asking traffic stop detainees a moderate number of roadside questions. Motorists must not, however, be subjected to "sustained and intimidating interrogation at the scene of their initial detention." Id.

3. Routine booking questions

No *Miranda* warnings are needed prior to asking questions to secure the "biographical data necessary to complete booking or pretrial services." Such questions include the suspect's name, address, height, weight, eye color, date of birth, and age. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

G. Miscellaneous aspects of the motion to suppress: (*State v. Edmonds* Dilemma)

In *State v. Edmonds*, 323 Conn. 34 (2016), the Supreme Court has profoundly changed the landscape for motions to suppress. The essential thrust of the decision is that the appellate court may engage in a probing factual review of the entire record, looking for "any undisputed evidence that does not support the trial court's ruling in favor of the State but that the trial court did not expressly discredit."

1. What does this mean:

- The effect of *Edmonds* means that motions to suppress may essentially be re-tried on appeal by appellate attorneys and jurists with little regard for what happened below. The appellate court is allowed to look at the entire record, *not just the express findings of the trial court*, and if there is evidence which was not expressly contested, it is fair game on appeal for the reviewing court to use against the prevailing party and the trial court. In the past, reviewing courts typically just assumed that the trial court had implicitly rejected or discounted such evidence.

2. What are the consequences:

- The import of this decision is that a prosecutor facing a motion to suppress must carefully consider what to put into evidence and avoid that which is unnecessary or extraneous. This is understandably a very difficult task because it requires the prosecutor to walk a fine line between offering enough evidence to satisfy the burden of proof, and not so much evidence that, even if "undisputed" at the hearing, may be later used against the State by the reviewing court.

Note: - In the context *Edmonds*, "undisputed" seems to mean that the evidence exists somewhere in the record and was not expressly discredited by the trial court. It does not mean contemplated and agreed to by the parties, and it does not matter what, if any, role it played at the hearing.

3. What to do about it:

First: As stated, prosecutors conducting motions to suppress must carefully consider what to introduce into evidence. Attempt to limit the evidence you present to that which is necessary for, and consistent with, the State's factual theory of the case. Be careful of presenting, or agreeing to the admission of, documentary evidence without examining it in its entirety. If a document comes in without limitation, its entire content is fair game on appeal.

Second: The factual and legal arguments you make in support of your position must be carefully crafted with an understanding that the theory of the case you present to the court *might not limit what may later be claimed on appeal.* Also, to the extent possible, seek to expressly challenge and dispute evidence of record that is inconsistent with the State's factual theory, *regardless* of whether the defense considers it important or not.

Third: Judges issuing rulings on the motions to suppress must be educated that their decisions must contain unmistakably clear, concise and express credibility determinations and findings of material fact, taking care not to ignore, overlook, or leave unaccounted for, any "undisputed" evidence of record that is arguably adverse to the ruling. Urge the court to articulate in its decision the fact that they have carefully considered the entire record and, whether expressly noted or not, they have rejected or chosen not to credit all of the evidence in the record that is either contrary to, or does not support, their decision.

Note: - Even though *Edmonds* was decided in the context of a 4th Amendment motion to suppress evidence, unfortunately, it is reasonable to assume that its holding will eventually apply in the review of a motion to suppress a statement or an identification. Therefore, precautions should be taken in any suppression hearing.

# III. Motion to Suppress Eyewitness Identification

A. Basic Premise:

The U.S. Supreme has stated "[a]ny conviction that rests on a mistaken identification is a gross miscarriage of justice." *Stovall v. Denno*, 388 U.S. 293 (1967). Therefore, the 14th Amendment requires the exclusion of any identification evidence … when the identification procedure used is so impermissibly suggestive as to give rise to a very substantial likelihood of an irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377 (1968).

B. Prosecutor's role at the motion to suppress identification:

If a defendant files a motion to suppress an identification, he has the burden to show that both the identification procedure was unnecessarily suggestive, and that the resulting identification was not reliable. Therefore, the prosecutor, in somewhat of a role reversal, is in the position of "defending" the attack. The prosecutor may argue, based on either deficiencies in the defendant's proof, or upon evidence introduced by the State, either that (1) the identification procedure was NOT unnecessarily suggestive, or (2) that the resulting identification was nevertheless reliable. Each of these components is discussed in detail below.

C. Two types of motions to suppress identifications:

In general, motions to suppress eyewitness identifications filed by a defendant fall into two categories:

(1) Motion to suppress an **out-of-court** identification.

(2) Motion to suppress an **in-court** identification.

### 1. Motion to suppress an out-of-court identification

There are primarily four types of out-of-court identification procedures currently used by law enforcement:

1. Photo "array" lineups
2. "Single photo" viewings
3. One-on-one "show-ups"'
4. Field views

Note:- The 'live lineup' is still a viable identification procedure, but its use has been diminished given the ease and quickness with which photo lineups can be done. Their use generally follows the same rules as a photo array.

**a. <u>Photo array lineups</u>:**

A photo array, also known as a photo lineup or photo display, is a procedure used by law enforcement wherein the police show a set of photographs to a victim or witness to discover or confirm the identity of a criminal suspect.

Since 2013, the procedure for conducting a photo lineup (or a live lineup) is largely governed by CGS § 54-1p.

<u>Note</u>: - This statute, although lengthy, is included below for two important reasons:

(1) if the procedure is not followed by law enforcement, it may be exploited in the motion to suppress, and

(2) it serves as an excellent guide for formulating the appropriate questions to pose to witnesses who will testify on behalf of the State in the hearing on a motion to suppress.

i. Statutory requirements for photo array (and live) lineups CGS § 54-1p

The following are the requirements for a photo lineup as codified in 54-1p:

(1) Sequential presentation

- Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup or the persons participating in a live lineup shall be presented sequentially so that the eyewitness views one photograph or one person at a time.

(2) Double-blind procedure

- The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup or live lineup is suspected as the perpetrator of the offense.

<u>Note</u>: - If it is not practicable to conduct a double blind photo lineup, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure.

(3) Specific instructions to the eyewitness

- The eyewitness shall be instructed prior to the identification procedure:

1. That the eyewitness will be asked to view an array of photographs or a group of persons, and that each photograph or person will be presented one at a time;

2. That it is as important to exclude innocent persons as it is to identify the perpetrator;

3. That the persons in a photo lineup or live lineup may not look exactly as they did on the date of the offense because features like facial or head hair can change;

4. That the perpetrator may or may not be among the persons in the photo lineup or live lineup;

5. That the eyewitness should not feel compelled to make an identification;

6. That the eyewitness should take as much time as needed in making a decision; and

7. That the police will continue to investigate the offense regardless of whether the eyewitness makes an identification.

(4) Other instructions

- In addition to the instructions required by section (3) above, the eyewitness shall be given any other instructions as may be developed and promulgated by P.O.S.T. and/or the Division of State Police.

(5) 'Fillers' must look generally like the suspect

- The photo lineup or live lineup shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and, in the case of a photo lineup, so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out.

(6) Fillers must be different from prior lineups of different suspect

- If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the person suspected as the perpetrator participates or in which the photograph of the person suspected as the perpetrator is included shall be different from the fillers used in any prior lineups.

(7) Number of fillers

- At least five fillers shall be included in the photo lineup and at least four fillers shall be included in the live lineup, in addition to the person suspected as the perpetrator.

(8) Photos must be devoid of markings

- In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness.

(9) In live lineup, all participants must do the same things

- In a live lineup, any identification actions, such as speaking or making gestures or other movements, shall be performed by all lineup participants.

(10) In live lineup, all participants must initially be out of view

- In a live lineup, all lineup participants shall be out of the view of the eyewitness at the beginning of the identification procedure.

(11) Only one suspected perpetrator may be included

- The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure.

(12) Position of the perpetrator shall not be mentioned

- Nothing shall be said to the eyewitness regarding the position in the photo lineup or the live lineup of the person suspected as the perpetrator.

(13) Nothing should be said to the eyewitness to influence selection

- Nothing shall be said to the eyewitness that might influence the eyewitness' selection of the person suspected as the perpetrator.

(14) If perpetrator selected, degree of certainty must be ascertained

- If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior to obtaining the eyewitness' statement regarding how certain he or she is of the selection.

(15) Report of the identification procedure must be written which contains:

1. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness' own words regarding how certain he or she is of the selection;
2. The names of all persons present at the identification procedure;
3. The date and time of the identification procedure;
4. In a photo lineup, the photos presented to the eyewitness or copies;
5. In a photo lineup, identification information on all persons whose photo was included in the lineup and the sources of all photos used; and
6. In a live lineup, identification information on all persons who participated in the lineup.

ii. Basic test for determining the constitutionality of a photo lineup (or a live lineup)

To determine whether an identification procedure violated the defendant's due process rights (thus making the identification vulnerable to suppression), the court must engage in a two-pronged analysis:

1) the court must determine whether the identification procedure itself was *unnecessarily suggestive*, and

2) if, and only if, the procedure is found to be unnecessarily suggestive, the court must then determine whether the identification was nevertheless *reliable* based on the totality of the circumstances. *State v. Outing*, 298 Conn. 34 (2010); *State v. Miller*, 202 Conn. 463 (1987); see also *Manson v. Brathwaite*, 432 U.S. 98 (1977).

Remember: - If the court determines that the identification procedure was not unnecessarily suggestive, that is the end of the analysis, and the identification is admissible (subject to any other objection).

1) Was the identification procedure unnecessarily suggestive ?

This is the first prong of the identification procedure inquiry. This prong is often misunderstood. The issue is not simply whether the identification procedure was suggestive, because by their very nature, identification procedures are suggestive. The key is whether the identification procedure was UNNECESSARILY suggestive.

Basic Rule: - "An identification procedure is unnecessarily suggestive only when it "give[s] rise to a very substantial likelihood of irreparable misidentification*." State v. Cook,* 262 Conn. 825

Whether the procedure is unnecessarily suggestive, thus giving rise to a very substantial likelihood of irreparable misidentification, is a fact-bound determination made on a case-by-case basis.

The Connecticut Supreme Court succinctly framed this issue when it said:

> The critical question... is what makes a particular identification procedure suggestive enough to require the court to proceed to the second prong and to consider the overall reliability of the identification.... In deciding that question... the entire procedure, viewed in light of the factual circumstances of the individual case ... must be examined to determine if a particular identification is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to consider the reliability of the identification itself in order to determine whether it ultimately should be suppressed. (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State v. Revels*, 313 Conn. 762, (2014).

In *State v. Marquez*, 291 Conn. 122 (2009), the court earlier addressed the suggestiveness prong of the identification procedure. The court stated that the focus of this prong is on both the mechanics of the photo array itself and the behavior of the officers administering it:

> There are...two factors that courts have considered in analyzing photo identification procedures for improper suggestiveness. The first factor concerns the composition of the photo array itself… The second factor, which is related to the first but [is] conceptually broader, requires the court to examine the actions of law enforcement personnel. Id.

a) Understanding the suggestiveness prong / attacking the photographic array

In reviewing attacks to the composition of the photographic array itself, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect.

To further understand the application of this prong, below are some cases where the court has addressed the composition of the array:

- Multiple photographs of same individual in same or subsequent photographic arrays possibly suggestive when, in the context of the entire array, the recurrence unnecessarily emphasizes the defendant's photograph. *State v. Williams*, 203 Conn. 159 (1987).

- When a feature is placed on the defendant's photograph in order to make the picture conform to the witness' description of the criminal he or she had seen, the identification proceeding has been held to have been rendered highly suggestive. *State v. Gold*, 180 Conn. 619 (1980).

- Whether the photographic array included, as far as was practicable, a reasonable number of persons similar in appearance to the suspect. *United States v. DeCologero*, 530 F.3d 36 (2008).

- The recurrent use of a defendant's picture in successive arrays was held not presumptively suggestive. *State v. Mayette*, 204 Conn. 571 (1987)

- A witness' previous viewing of old photos of the defendant did not make the procedure unnecessarily suggestive. *State v. Miller*, 202 Conn. 463 (1987).

- Two days after viewing an array of six photos from which the witness chose two as looking like the man he had seen, the witness again chose the defendant's photo from a seven-photo array. The court found this procedure not unnecessarily suggestive even though the witness was shown the picture selected two days earlier in a different setting to see if he remained constant in his identification. *State v. Milner*, 206 Conn. 512 (1988).

- When the initial identification is made with a high degree of assurance and the photograph in the second array is more recent than that used in the first, the procedure may not be unnecessarily suggestive. *State v. Hinton*, 196 Conn. 289, (1985).

- Two witnesses were shown an array of twenty-four photographs, which included one of the defendant, and then were shown an array of sixteen photographs, including two of the defendant. This was held not to be "unnecessarily suggestive." *State v. Boucino*, 199 Conn. 207 (1986).

- The court did not abuse its discretion in rejecting the defendant's argument that because he was the only person in the photo array wearing a hooded sweatshirt it was a valid basis for finding the array unnecessarily suggestive. *State v. Grant*, 154 Conn.App. 293 (2014).

- The police procedures were impermissibly suggestive when those procedures included the recurrence of the defendant's photograph in two successive displays of eight photographs where only the defendant's photograph was repeated. *State v. Ledbetter*, 275 Conn. 534 (2005).

Note: - The court made it clear that the identification procedure is NOT to be judged against a “best practices” test. Consequently, the question is not whether a better procedure could have been used, but whether the procedure that was used was unnecessarily suggestive. *State v. Marquez*, 291 Conn. 122 (2009).

b) Understanding the suggestiveness prong / attacking the conduct of the police

Regarding attacks to the conduct of the police in administering the identification procedure, the court will examine whether the witness' attention was directed to a suspect because of the police conduct. In considering this factor, the court should look to the effects of the circumstances of the pretrial identification, not whether law enforcement officers intended to prejudice the defendant. *State v. Marquez*, 291Conn 122 (2009).

To further understand the application of this prong, below are some cases where the court has addressed the investigative prong:

- There was no basis for claiming that the display itself was suggestive or that [the administering officer] was suggestive in any respect in the selection process. *State v. Ledbette*r, 185 Conn. 607 (1981).

- Witnesses were not told anything about the progress of the investigation, or that the [law enforcement] agents in any other way suggested which persons in the pictures were under suspicion. *Simmons v. U.S., 390 U.S. 377 (1968).*

- [A] procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police. *State v. Gold,*180 Conn. 619 at 656 (1980).

2) Was the identification nevertheless reliable ?

This is the second prong of the identification procedure inquiry. Remember, you do not ever get to this prong unless the identification procedure is found to be unnecessarily suggestive.

"The fact that a particular confrontation is impermissibly suggestive, however, does not automatically exclude the resulting identification. Because the linchpin in determining the admissibility of identification testimony is reliability, the central question is whether under the `totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *State v. Ledbetter*, 275 Conn. 534 (2005).

Basic Rule: - To determine whether an identification that resulted from an unnecessarily suggestive procedure is nevertheless reliable, the corruptive effect of the suggestive procedure is weighed against certain factors. These are known as the five "*Biggers*" factors. *Neil v. Biggers*, 409 U.S. 188 (1972).

They are:

1. The opportunity of the witness to view the criminal at the time of the crime,

2. the witness' degree of attention at the time of the observation,

3. the accuracy of witness' prior description of the criminal,

4. the level of certainty demonstrated at the identification, and

5. the time between the crime and the identification.

Important: - Whether the State can prove that the photo array identification was reliable under the totality of the circumstances is a fact-bound determination that will turn primarily on the State's success or failure in relating the *Biggers* factors above, to the specific facts of the case.

iii. Defendant's burden of proof

It is the defendant who must satisfy BOTH prongs of the identification procedure inquiry in order to prevail on a motion to suppress an identification. *State v. Ledbetter*, 275 Conn. 534 (2005).

iv. Procedure

If a defendant files a motion to suppress an eyewitness identification, he bears the initial burden to put on evidence to show that the identification resulted from an unconstitutional (i.e., unnecessarily suggestive) procedure. *State v. Williamson*, 206 Conn. 685 (1988). From there, it remains the defendant's burden to show that the unconstitutional procedure resulted in an identification that was also not reliable under the totality of the circumstances.

v. Finding

If the court finds that the defendant has NOT met his burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation).

If the court finds that the defendant HAS met his burden, then the evidence will be suppressed, and thus will not be admissible at trial.

vi. Miscellaneous aspects of the motion to suppress (*State v. Edmonds* Dilemma)

- In *State v. Edmonds*, 323 Conn. 34 (2016), the Supreme Court has profoundly changed the landscape for motions to suppress. The essential thrust of the decision is that the appellate court may engage in a probing factual review of the entire record, looking for "any undisputed evidence that does not support the trial court's ruling in favor of the State but that the trial court did not expressly discredit."

1. What does this mean:

- The effect of *Edmonds* is that motions to suppress may essentially be re-tried on appeal by appellate attorneys and jurists with little regard for what happened below. The appellate court is allowed to look at the entire record, *not just the express findings of the trial court*, and if there is evidence which was not expressly contested, it is fair game on appeal for the reviewing court to use against the prevailing party and the trial court. In the past, reviewing courts typically just assumed that the trial court had implicitly rejected or discounted such evidence.

2. What are the consequences:

- The import of this decision is that a prosecutor facing a motion to suppress must carefully consider what to put into evidence and avoid that which is unnecessary or extraneous. This is understandably a very difficult task because it requires the prosecutor to walk a fine line between offering enough evidence to satisfy the burden of proof, and not so much evidence that, even if "undisputed" at the hearing, may be later used against the State by the reviewing court.

Note: - In the context *Edmonds*, "undisputed" seems to mean that the evidence exists somewhere in the record and was not expressly discredited by the trial court. It does not mean contemplated and agreed to by the parties, and it does not matter what, if any, role it played at the hearing.

3. What to do about it:

First: As stated, prosecutors conducting motions to suppress must carefully consider what to introduce into evidence. Attempt to limit the evidence you present to that which is necessary for, and consistent with, the State's factual theory of the case. Be careful of presenting, or agreeing to the admission of, documentary evidence without examining it in its entirety. If a document comes in without limitation, its entire content is fair game on appeal.

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Third: Judges issuing rulings on the motions to suppress must be educated that their decisions must contain unmistakably clear, concise and express credibility determinations and findings of material fact, taking care not to ignore, overlook, or leave unaccounted for, any "undisputed" evidence of record that is arguably adverse to the ruling. Urge the court to articulate in its decision the fact that they have carefully considered the entire record and, whether expressly noted or not, they have rejected or chosen not to credit all of the evidence in the record that is either contrary to, or does not support, their decision.

Note: - Even though *Edmonds* was decided in the context of a 4th Amendment motion to suppress evidence, unfortunately, it is reasonable to assume that its holding will eventually apply in the review of a motion to suppress a statement or an identification. Therefore, precautions should be taken in any suppression hearing.

**b. <u>"Single photo" viewing</u>**

A single photo viewing, as the name implies, involves law enforcement showing a single photograph to a victim or witness to discover or confirm the identity of a criminal suspect.

i. Basic Premise

Absent exigent circumstances that require police officers "promptly [to establish] either the defendant's complicity or his innocence", the showing of a single photograph of a defendant is almost always unnecessarily and impermissibly suggestive. *State v. Findlay*, 198 Conn. 328 (1986).

ii. Basic test for identification procedures involving single photo viewing

To determine whether an identification procedure violated the defendant's due process rights (thus making the identification vulnerable to being suppressed), the court must engage in a two-pronged analysis:

(1) The court must determine whether the identification procedure itself was *unnecessarily suggestive*, and

(2) if, and only if, the procedure is found to be unnecessarily suggestive, the court must then determine whether the identification was nevertheless *reliable* based on the totality of the circumstances. *State v. Outing*, 298 Conn. 34 (2010); *State v. Miller*, 202 Conn. 463 (1987); see also *Manson v. Brathwaite*, 432 U.S. 98 (1977).

1) Was the identification procedure unnecessarily suggestive ?

As stated above, because the court has determined that the showing of a single photograph of a defendant is almost always unnecessarily and impermissibly suggestive, this prong will most often be decided in the defendant's favor. Therefore, the argument on this type of motion to suppress usually turns on the second prong, which is whether the identification was nevertheless *reliable.*

2) Was the in-court identification nevertheless reliable ?

Whether a subsequent in-court identification of the suspect is reliable when law enforcement employs an out-of-court single photo viewing is determined by the same inquiry as if the police used a photo array procedure.

That is, whether “under the `totality of the circumstances', the in-court identification was reliable even though the confrontation procedure was suggestive." *State v. Ledbetter*, 275 Conn. 534 (2005).

Basic Rule: - To determine whether an identification that resulted from an unnecessarily suggestive procedure is nevertheless reliable, the corruptive effect of the suggestive procedure is weighed against certain factors. These are known as the five “*Biggers*” factors. *Neil v. Biggers*, 409 U.S. 188 (1972).

They are:

1. The opportunity of the witness to view the criminal at the time of the crime,
2. the witness’ degree of attention at the time of the observation,
3. the accuracy of witness’ prior description of the criminal,
4. the level of certainty demonstrated at the identification, and
5. the time between the crime and the identification.

Important: - Whether the State can prove that the single photo viewing identification was reliable under the totality of the circumstances is a fact-bound determination that will turn primarily on the State’s success or failure in relating the *Biggers* factors above to the specific facts of the case.

To further understand the application of this rule, below are some cases where the court has had occasion to address the issue of single photo viewing:

- Although the showing of a single photo was unnecessarily suggestive, the court held that the identification was reliable because the identification was unplanned, the witness approached the officer voluntarily, and the photo was viewed for a short time only. "The witness had ample opportunity to view the defendant on the day of the crime and had focused his attention on her." *State v. Findlay*, 198 Conn. 328 (1986).

- Although the viewing of the single photo was unnecessarily suggestive, the court held that the identification was reliable because the witness had four separate opportunities to view the defendant. On each occasion, the witness had a clear view of the defendant's face and sufficient time to observe it. The witness gave an accurate description of the defendant to the police and was "extremely certain of his identification". *State v. Evans*, 200 Conn. 350 (1986).

- In an arson prosecution, two witnesses were shown a single photo of the defendant. They testified they saw the defendant on two occasions at a gas station where one of them worked. They remembered the defendant because of his distinctive appearance and because they thought it strange for him to purchase gas in a container late at night in October. They viewed him in a well-lit area for several minutes. Under these circumstances, the court found the identification reliable. *State v. Ramsundar*, 204 Conn. 4 (1987).

- Viewing a single photo by police officer who was an eyewitness was found reliable because of the officer's eyewitness skill and the fact that he viewed the photo in the absence of any coercive pressure to make an identification. *State v. Vega,* 13 Conn.App. 438 (1988).

iii. Defendant's burden of proof

It is the defendant who must satisfy BOTH prongs of the identification procedure inquiry in order to prevail on a motion to suppress an identification. *State v. Ledbetter*, 275 Conn. 534 (2005).

iv. Procedure

If a defendant files a motion to suppress an eyewitness identification, he bears the initial burden to put on evidence to show that the identification resulted from an unconstitutional (i.e., unnecessarily suggestive) procedure. *State v. Williamson*, 206 Conn. 685 (1988). From there, it remains the defendant's burden to show that the unconstitutional procedure resulted in an identification that was also not reliable under the totality of the circumstances.

v. Finding

If the court finds that the defendant has NOT met his burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation).

If the court finds that the defendant HAS met his burden, then the evidence will be suppressed, and thus will not be admissible at trial.

vi. Miscellaneous aspects of the motion to suppress (*State v. Edmonds* Dilemma)

- See section "vi." above in photo array lineups for the *State v. Edmonds* dilemma.

## c. One-on-one "show-ups"

A one-on-one show-up is a procedure where a single person, suspected to be the perpetrator of an offense, is presented face-to-face to a witness for the purpose of determining whether the eyewitness is able to identify the person. This type of procedure is usually done by law enforcement in instances where a suspect is apprehended very shortly after the crime or where there is a concern for the future health or availability of the witness.

### i. Basic Premise

A one-on-one show-up has been deemed "inherently and significantly suggestive…because it conveys the message that police have reason to believe the suspect guilty". *State v. Mitchell*, 204 Conn. 187 (1987). But again, this does not end the inquiry. Even if the show-up is deemed to be suggestive, the question still must be asked whether it was *unnecessarily* suggestive. Id.

### ii. Basic test for identification procedures involving a one-on-one show-up

To determine whether an identification procedure violated the defendant's due process rights (thus making the identification vulnerable to being suppressed), the court must engage in a two-pronged analysis:

(1) The court must determine whether the identification procedure itself was *unnecessarily suggestive*, and

(2) if, and only if, the procedure is found to be unnecessarily suggestive, the court must then determine whether the identification was nevertheless *reliable* based on the totality of the circumstances. *State v. Outing*, 298 Conn. 34, (2010); *State v. Miller*, 202 Conn. 463 (1987); see also *Manson v. Brathwaite*, 432 U.S. 98 (1977).

1) Was the identification procedure unnecessarily suggestive ?

As stated above, a one-on-one show-up has been deemed “inherently and significantly suggestive” by our Connecticut Supreme Court, but the key is whether the one-one-one procedure was UNNECESSARILY suggestive.

Basic Rule: - "An identification procedure is unnecessarily suggestive only when it "give[s] rise to a very substantial likelihood of irreparable misidentification*." State v. Cook,* 262 Conn. 825, (2003).

Whether the procedure is unnecessarily suggestive, thus giving rise to a very substantial likelihood of irreparable misidentification, is a fact-bound determination made on a case-by-case basis.

Not all one-on-one show-ups will be deemed unnecessarily suggestive by the court. This is because “prompt on-the-scene confrontations tend under some circumstances to ensure accurate identifications and the benefit of promptness not only aids reliability, but permits a quick release of an innocent party if there is no positive identification, allowing the police to resume the investigation with only a minimum of delay.” *State v. Bell*, 13 Conn.App. 420 (1988).

In *State v. Revels*, 313 Conn. 762 (2014), a one-on-one show-up was deemed NOT unnecessarily suggestive where the exigencies of the situation were the following: There was a report of shots fired, a man lay dying in the street, and reason to believe the shooter was armed and on the run. Under these circumstances, the court concluded that the police were justified in acting quickly to determine whether the eyewitness to the shooting could or could not identify the suspect. An immediate attempt at an identification further ensured that the victim viewed the suspect while her recollection was still fresh. The court also took into account the lateness of the hour (11:40 p.m.), which it said made a quick line-up effectively impossible and a quick photo array impracticable.

2) Was the identification nevertheless reliable ?

This is the second prong of the identification procedure inquiry. Remember, you do not ever get to this prong unless the identification procedure is found to be unnecessarily suggestive.

"The fact that a particular confrontation is impermissibly suggestive, however, does not automatically exclude the resulting identification. Because the linchpin in determining the admissibility of identification testimony is reliability, the central question is whether under the `totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *State v. Ledbetter*, 275 Conn. 534 (2005). .

Basic Rule: - To determine whether an identification that resulted from an unnecessarily suggestive procedure is nevertheless reliable, the corruptive effect of the suggestive procedure is weighed against certain factors. These are known as the five "*Biggers*" factors. *Neil v. Biggers*, 409 U.S. 188 (1972).

They are:

1. The opportunity of the witness to view the criminal at the time of the crime,

2. the witness' degree of attention at the time of the observation,

3. the accuracy of witness' prior description of the criminal,

4. the level of certainty demonstrated at the identification, and

5. the time between the crime and the identification.

Important: - Whether the State can prove the one-on-one identification was reliable under the totality of the circumstances is a fact-bound determination that will turn primarily on the State's success or failure in relating the *Biggers* factors to the specific facts of the case.

iii. Defendant's burden of proof

It is the defendant who must satisfy BOTH prongs of the identification procedure inquiry in order to prevail on a motion to suppress an identification. *State v. Ledbetter*, 275 Conn. 534 (2005).

iv. Procedure

If a defendant files a motion to suppress an eyewitness identification, he bears the initial burden to put on evidence to show that the identification resulted from an unconstitutional (i.e., unnecessarily suggestive) procedure. *State v. Williamson*, 206 Conn. 685 (1988). From there, it remains the defendant's burden to show that the unconstitutional procedure resulted in an identification that was also not reliable under the totality of the circumstances.

v. Finding

If the court finds that the defendant has NOT met his burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation).

If the court finds that the defendant HAS met his burden, then the evidence will be suppressed, and thus will not be admissible at trial.

vi. Miscellaneous aspects of the motion to suppress (*State v. Edmonds* Dilemma)

- See section "vi." above in photo array lineups for the *State v. Edmonds* dilemma.

## d. Field views

A field view is a procedure where the eyewitness views a group of people in a public place on the theory that the subject may be among the group. A field view differs from a one-on-one show-up in that it is usually conducted well after the commission of the crime and may be conducted with or without the suspect in the group.

### i. Basic Premise

A field view will generally not be deemed to be unnecessarily suggestive because it is normally conducted in a public location where the suspect may or may not be present, and the eyewitness is permitted to view a group of people in an effort to identify a suspect. See *State v. DeMatteo*, 13 Conn.App. 596 (1988).

### ii. Basic test for identification procedures involving a field view

To determine whether an identification procedure violated the defendant's due process rights (thus making the identification vulnerable to being suppressed), the court must engage in a two-pronged analysis:

(1) the court must determine whether the identification procedure itself was *unnecessarily suggestive*, and

(2) only if the procedure is found to be unnecessarily suggestive, the court must then determine whether the identification was nevertheless *reliable* based on the totality of the circumstances. *State v. Outing*, 298 Conn. 34 (2010); *State v. Miller*, 202 Conn. 463 (1987); see also *Manson v. Brathwaite*, 432 U.S. 98 (1977).

1) Was the identification procedure unnecessarily suggestive ?

As stated above, a field view will generally not be deemed to be unnecessarily suggestive because it is normally conducted in a public location where the suspect may or may not be present. Therefore, the defendant may have a very difficult time in meeting his burden on this first prong of the suppression motion, and thus the inquiry need not go further.

If, however, the field view is found to be unnecessarily suggestive, then the defendant must still satisfy the second prong and show that the identification was not reliable.

Basic Rule: - "An identification procedure is unnecessarily suggestive only when it "give[s] rise to a very substantial likelihood of irreparable misidentification*." State v. Cook,* 262 Conn. 825, (2003).

Whether the procedure is unnecessarily suggestive, thus giving rise to a very substantial likelihood of irreparable misidentification, is a fact-bound determination made on a case-by-case basis.

Important: - In order for law enforcement to ensure that a field view will not be deemed unnecessarily suggestive, the officer conducting the field view should not direct the eyewitness' attention to any particular person, make any suggestions, or otherwise attempt to influence the witness' ability to observe the group.

2) Was the identification nevertheless reliable ?

This is the second prong of the identification procedure inquiry. Remember, you do not ever get to this prong unless the identification procedure is found to be unnecessarily suggestive.

"The fact that a particular confrontation is impermissibly suggestive, however, does not automatically exclude the resulting identification. Because the linchpin in determining the admissibility of identification testimony is reliability, the central question is whether under the `totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *State v. Ledbetter*, 275 Conn. 534 (2005). .

Basic Rule: - To determine whether an identification that resulted from an unnecessarily suggestive procedure is nevertheless reliable, the corruptive effect of the suggestive procedure is weighed against certain factors. These are known as the five "*Biggers*" factors. *Neil v. Biggers*, 409 U.S. 188 (1972).

They are:

1. The opportunity of the witness to view the criminal at the time of the crime,

2. the witness' degree of attention at the time of the observation,

3. the accuracy of witness' prior description of the criminal,

4. the level of certainty demonstrated at the identification, and

5. the time between the crime and the identification.

Important: - Whether the State can prove that the field view identification was reliable under the totality of the circumstances is a fact-bound determination that will turn primarily on the State's success or failure in relating the *Biggers* factors above to the specific facts of the case.

iii. Defendant's burden of proof

It is the defendant who must satisfy BOTH prongs of the identification procedure inquiry in order to prevail on a motion to suppress an identification. *State v. Ledbetter*, 275 Conn. 534 (2005).

iv. Procedure

If a defendant files a motion to suppress an eyewitness identification, he bears the initial burden to put on evidence to show that the identification resulted from an unconstitutional (i.e., unnecessarily suggestive) procedure. *State v. Williamson*, 206 Conn, 685 (1988). From there, it remains the defendant's burden to show that the unconstitutional procedure resulted in an identification that was also not reliable under the totality of the circumstances.

v. Finding

If the court finds that the defendant has NOT met his burden of proof, then the evidence will be admissible in the defendant's trial (subject to any other possible objection or limitation).

If the court finds that the defendant HAS met his burden, then the evidence will be suppressed, and thus will not be admissible at trial.

vi. Miscellaneous aspects of the motion to suppress (*State v. Edmonds* Dilemma)

- See section "vi." above in photo array lineups for the *State v. Edmonds* dilemma.

## 2. Motions to suppress in-court identifications

In *State v. Dickson*, 322 Conn. 410 (2016), the Connecticut Supreme Court directly confronted the issue of "first-time" in-court identifications and set certain standards for their admissibility.

a. Basic *Dickson* Premise

Regarding in-court identifications, the court stated, "we are hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the State has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." *State v. Dickson*, 322 Conn. 410 (2016).

b. When does *Dickson* apply ?

An in-court identification, hopefully, will not be the first time the witness is asked if he or she can identify the defendant. The in-court identification of the defendant will generally have been preceded by an out-of-court identification procedure. There are four possible scenarios: (also see chart below)

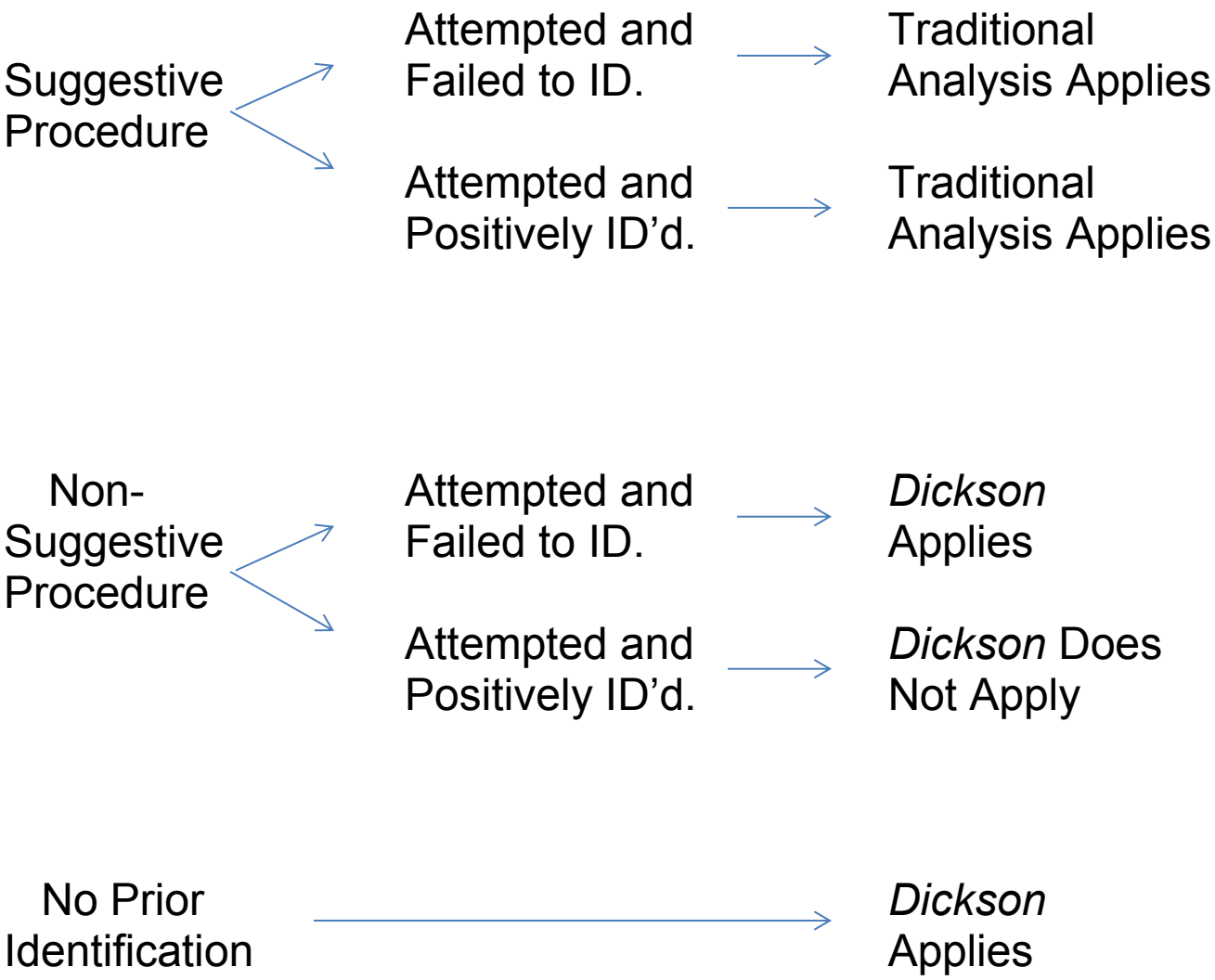
i. If an out-of-court identification WAS MADE through an out-of-court identification procedure which was held to be unnecessarily suggestive, then both the in-court and the out-of-court identifications are subject to challenge under the conventional *Manson v.Brathwaite* analysis based on the corrupting effect of the suggestive procedure, and will be subject to exclusion if the trial court determines that the procedure resulted in a substantial likelihood of misidentification.

ii. If an out-of-court identification was attempted and FAILED through an out-of-court identification procedure which was held to be unnecessarily suggestive, then any attempt to elicit an in-court identification is subject to challenge under the conventional *Manson v.Brathwaite* analysis.

iii. If an out-of-court identification WAS MADE through an out-of-court identification procedure which was held NOT to be unnecessarily suggestive, *Dickson* does not apply.

iv. If an out-of-court identification was attempted and FAILED through an out-of-court identification procedure which was held NOT to be unnecessarily suggestive, then the in-court identification is governed by *State v. Dickson*.

# When Does *State v. Dickson* Apply to an Identification ?



c. The *Dickson* standard for admissibility

In *Dickson*, the court concluded that "first time" in-court identifications are unnecessarily and inherently suggestive, implicate due process concerns, and therefore may be undertaken only with the trial court's permission after prescreening for admissibility.

A "first-time" in-court identification is one in which the witness either has:

(1) never attempted to identify the accused; or

(2) has previously attempted and failed to identify the accused during a nonsuggestive procedure.

Note: - Determining whether a prior procedure resulted in a failed identification, or one that was simply weak, will "require the exercise of judgment."

- Generally speaking, if a witness previously identified the defendant, even with some uncertainty, then the in-court identification need not be pre-screened for admissibility, and the witness' degree of uncertainty at the initial procedure will go to its weight, not its admissibility.

i. Prescreening for admissibility of an in-court identification (Asking for permission)

In a case where there has been no pretrial identification, and the State intends to present a "first time" in-court identification (as defined above), the State must first request permission to do so from the court.

Note: - This is because first time in-court identifications, like in-court identifications that are tainted by an unnecessarily suggestive out-of-court identification, implicate due process protections and must be prescreened by the court to ensure constitutional fairness.

The following two scenarios are contemplated by the *Dickson* prescreening:

1) Permission Granted:

The trial court may grant permission to ask a witness to make an in-court identification only if it determines either:

(1) that there is no factual dispute as to the identity of the perpetrator, or

(2) the ability of the particular eyewitness to identify the defendant is not at issue.

Note: - Included in the latter category are those cases in which the eyewitness knew the defendant prior to the crime (i.e., family member or longtime friend as opposed to more casual acquaintance). The court does not offer a requisite threshold degree of familiarity, making this a likely controverted issue.

2) Permission Not Granted:

If your case does not fall into one or both of the above categories, permission cannot be granted.

However: - The State "may request permission to conduct a nonsuggestive identification procedure, namely, at the State's option, an out-of-court lineup or photographic array [that conforms with the requirements of General Statutes § 54-1p]". *Dickson*, at 446.

Note: - The trial court ordinarily should grant the State's request to conduct the out-of-court lineup or array IF NO PRIOR identification procedure was attempted. If the eyewitness is then able to identify the defendant in a nonsuggestive out-of-court procedure, the State may then ask the eyewitness to identify the defendant in court.

d. Further aspects presented by *Dickson*:

i. Good cause exception

If your case is one in which the witness previously attempted and failed to identify the accused in a nonsuggestive procedure "the [trial] court should not allow a second nonsuggestive identification procedure unless the State can provide a good reason why a second bite at the apple is warranted." Id. at, 447.

Note: - Good reasons could include when a witness failed to identify the defendant in a photo array and the State now wants to conduct a lineup or a situation where the witness was threatened or intimidated before the first attempt.

ii. Request for jury instruction

In cases in which:

1. permission for an in-court identification is not granted, and
2. the trial court denies request for non-suggestive procedure, or
3. the State declines to conduct a non-suggestive procedure, or
4. the eyewitness is unable to identify the defendant in a non-suggestive procedure,

… then an in-court identification will not be allowed.

In this event: - The State is entitled to request, and the court may provide the jury with, an instruction along the lines of: "[A]n in-court identification was not permitted because inherently suggestive in-court identifications create a significant risk of misidentification and because either the State declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one."

Tactically, you may want to think twice about asking for this not so favorable instruction !

Important - Remember, an eyewitness may, of course, still testify for the State and be questioned regarding his or her observations of the perpetrator at the time of the crime, including their observations of the perpetrator's height, weight, sex, race, age and any other characteristics that the eyewitness was able to observe, and any other relevant and material matters. But the State should "avoid asking the witness if the defendant resembles the perpetrator."

iii. Avoiding the *Dickson* dilemma

The State has the discretion to avoid the Dickson dilemma by conducting a 54-1p identification procedure "at any point up to the witness' testimony."

Note: - The court advises that this occur as soon after the crime as is possible.

Note: - If the State does conduct a 54-1p identification procedure, and the witness fails to identify the accused, *Dickson* controls.

e. Miscellaneous aspects regarding in-court identifications

i. Lack of State action

If a witness has learned the identity of the person who has been charged with the crime under suggestive circumstances that are not the result of State action, such circumstances go to the weight of the identification testimony, not its admissibility.

ii. *State v. Edmonds* dilemma

- In *State v. Edmonds*, 323 Conn. 34 (2016), the Supreme Court has profoundly changed the landscape for motions to suppress. The essential thrust of the decision is that the appellate court may engage in a probing factual review of the entire record, looking for "any undisputed evidence that does not support the trial court's ruling in favor of the State but that the trial court did not expressly discredit."

1. What does this mean:

- The effect of *Edmonds* is that motions to suppress may essentially be re-tried on appeal by appellate attorneys and jurists with little regard for what happened below. The appellate court is allowed to look at the entire record, *not just the express findings of the trial court*, and if there is evidence which was not expressly contested, it is fair game on appeal for the reviewing court to use against the prevailing party and the trial court. In the past, reviewing courts typically just assumed that the trial court had implicitly rejected or discounted such evidence.

2. What are the consequences:

- The import of this decision is that a prosecutor facing a motion to suppress must carefully consider what to put into evidence and avoid that which is unnecessary or extraneous. This is understandably a very difficult task because it requires the prosecutor to walk a fine line between offering enough evidence to satisfy the burden of proof, and not so much evidence that, even if "undisputed" at the hearing, may be later used against the State by the reviewing court.

Note: - In the context *Edmonds*, "undisputed" seems to mean that the evidence exists somewhere in the record and was not expressly discredited by the trial court. It does not mean contemplated and agreed to by the parties, and it does not matter what, if any, role it played at the hearing.

3. What to do about it:

First: As stated, prosecutors conducting motions to suppress must carefully consider what to introduce into evidence. Attempt to limit the evidence you present to that which is necessary for, and consistent with, the State's factual theory of the case. Be careful of presenting, or agreeing to the admission of, documentary evidence without examining it in its entirety. If a document comes in without limitation, its entire content is fair game on appeal.

Second: The factual and legal arguments you make in support of your position must be carefully crafted with an understanding that the theory of the case you present to the court *might not limit what may later be claimed on appeal.* Also, to the extent possible, seek to expressly challenge and dispute evidence of record that is inconsistent with the State's factual theory, *regardless* of whether the defense considers it important or not.

Third: Judges issuing rulings on the motions to suppress must be educated that their decisions must contain unmistakably clear, concise and express credibility determinations and findings of material fact, taking care not to ignore, overlook, or leave unaccounted for, any "undisputed" evidence of record that is arguably adverse to the ruling. Urge the court to articulate in its decision the fact that they have carefully considered the entire record and, whether expressly noted or not, they have rejected or chosen not to credit all of the evidence in the record that is either contrary to, or does not support, their decision.

Note: - Even though *Edmonds* was decided in the context of a 4th Amendment motion to suppress evidence, unfortunately, it is reasonable to assume that its holding will eventually apply in the review of a motion to suppress a statement or an identification. Therefore, precautions should be taken in any suppression hearing.